

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

PHARMATECH SOLUTIONS, INC.,

Plaintiff,

v.

SHASTA TECHNOLOGIES, LLC,

Defendant.

Case No. [14-cv-03682-BLF](#)

**ORDER GRANTING MOTION TO
DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION; DENYING
MOTION TO DISMISS FOR FAILURE
TO STATE A CLAIM AS MOOT; AND
DISMISSING ACTION**

[RE: ECF 30]

Defendant Shasta Technologies, LLC (“Shasta”) seeks dismissal of the first amended complaint (“FAC”) under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. The Court has considered the briefing and the oral argument presented at the hearing on April 16, 2015. For the reasons discussed below, the motion to dismiss for lack of subject matter jurisdiction is GRANTED, the motion to dismiss for failure to state a claim is DENIED AS MOOT, and the action is DISMISSED for lack of subject matter jurisdiction.

I. BACKGROUND

Plaintiff PharmaTech Solutions, Inc. (“PharmaTech”) filed the complaint in this declaratory relief action on August 14, 2014 and, pursuant to a stipulation of the parties, filed the operative first amended complaint (“FAC”) on February 20, 2015. The FAC alleges the following facts: Defendant Shasta Technologies, LLC (“Shasta”) was the owner of a product known as the GenStrip, “a diagnostic test strip to be used in conjunction with diagnostic test meters, i.e., devices that measure a person’s blood sugar at any particular point in time.” FAC ¶ 5, ECF 28. The GenStrip was manufactured for Shasta by a company called Conductive Technologies, Inc.

1 (“CTI”). *Id.* In June 2011, PharmaTech entered into an exclusive distributorship agreement for
2 the GenStrip with Shasta and one of Shasta’s investors, Broadtree, Inc. (“Broadtree”). *Id.* ¶ 6.

3 Shasta marked the GenStrip boxes with the logo of Johnson & Johnson and its subsidiary,
4 Lifescan (collectively, “Lifescan”), along with a photograph of Lifescan’s “One Touch” blood
5 monitoring device. FAC ¶ 7. Lifescan, which had not consented to the use of its marks or images
6 on the GenStrip, sued Shasta, PharmaTech, and CTI in this district for violations of the Lanham
7 Act. *Id.* In May 2013, the district court presiding over that action issued a preliminary injunction
8 enjoining the use of GenStrip boxes bearing the Lifescan logo and One Touch photograph. *Id.* ¶ 8.
9 As a result, thousands of GenStrip boxes that PharmaTech had ordered and paid for became
10 unusable; PharmaTech had to order 74,256 replacement boxes. *Id.* ¶¶ 7-9.

11 In December 2013, the United States Food and Drug Administration (“FDA”) conducted a
12 surprise inspection of Shasta’s manufacturing facility in Sherwood, Oregon. FAC ¶ 10. It turned
13 out that the facility was the residential home of one of Shasta’s owners and members, Calvin A.
14 Knickerbocker III. *Id.* The FDA determined that the residence did not qualify as a manufacturing
15 facility. *Id.* Shasta then told the FDA that the manufacturers of the GenStrip were CTI and
16 PharmaTech. *Id.* ¶ 11.

17 Upon hearing about these events, PharmaTech’s board of directors held a telephonic
18 meeting on March 5, 2014 to formulate a plan designed to keep the FDA from removing the
19 GenStrip from the market and to keep the GenStrip product “alive.” FAC ¶ 12. PharmaTech
20 decided to (1) execute a binding term sheet to purchase the GenStrip and its mark from Shasta; (2)
21 hire a consultant to write and implement a suitable quality control plan meeting all FDA standards
22 and regulations with respect to the GenStrip, to be jointly administered by PharmaTech and CTI;
23 and (3) change PharmaTech’s principal executive offices to York, Pennsylvania and register
24 PharmaTech as a foreign corporation authorized to conduct business in Pennsylvania. *Id.*

25 On March 20, 2014, PharmaTech, Shasta, and Broadtree executed a written binding term
26 sheet under which PharmaTech agreed to purchase the GenStrip. FAC ¶ 19. On April 21, 2014,
27 PharmaTech entered into a “Quality Control Agreement” with CTI. *Id.* ¶ 13. Finally,
28 PharmaTech opened offices in York, Pennsylvania and registered as a foreign corporation

1 authorized to conduct business in Pennsylvania. *Id.* The FDA registered the York, Pennsylvania
2 address as the official facility of PharmaTech. *Id.*

3 While PharmaTech was taking these steps to save the GenStrip product, the FDA sent
4 Shasta a warning letter dated April 8, 2014, stating that the FDA's December 2013 inspection of
5 Shasta's facility in Sherwood, Oregon had revealed that Shasta was not compliant with the
6 governing Quality System Regulation. FAC ¶ 15 and Exh. A. Among other things, the warning
7 letter demanded that Shasta take immediate remedial action and voluntarily recall the GenStrip.
8 *Id.* Shasta did not respond. *Id.* The FDA subsequently issued a "Worldwide Safety Warning
9 Letter" to users, distributors, physicians, and others, halting the sale, use, and advertisement of the
10 GenStrip. *Id.* ¶ 16 and Exh. B. The FDA also directed users, sellers, and distributors to return any
11 GenStrips to the original point of sale. *Id.* Shasta's name and logo appeared on the 74,256
12 GenStrip boxes that PharmaTech had ordered to replace boxes bearing LifeScan's name and logo.
13 *Id.* ¶ 17. Because Shasta no longer can market the GenStrip, PharmaTech believes that it will be
14 required to take back and replace approximately 50,040 of those 74,256 GenStrip boxes. *Id.*

15 Based upon these allegations, PharmaTech asserts a single claim against Shasta entitled
16 "Declaratory and Injunctive Relief Re The Parties [sic] Binding Written Term Sheet." Shasta
17 moves to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) and failure to state a
18 claim under Rule 12(b)(6).

19 **II. Subject Matter Jurisdiction – Rule 12(b)(1)**

20 A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) raises a
21 challenge to the Court's subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). "In civil cases,
22 subject matter jurisdiction is generally conferred upon federal district courts either through
23 diversity jurisdiction, 28 U.S.C. § 1332, or federal question jurisdiction, 28 U.S.C. § 1331."
24 *Peralta v. Hispanic Business, Inc.*, 419 F.3d 1064, 1068 (9th Cir. 2005). The FAC alleges subject
25 matter on the basis of diversity of citizenship.¹ FAC ¶ 1. Diversity jurisdiction lies in "all civil
26

27 ¹ Although PharmaTech asserts a claim for declaratory relief, "the Declaratory Judgment Act does
28 not extend the jurisdiction of the federal courts"; a plaintiff asserting a declaratory judgment action
must plead an independent basis for subject matter jurisdiction. *Medtronic, Inc. v. Mirowski
Family Ventures, Inc.*, 134 S. Ct. 843, 848 (2014) (internal quotation marks and citation omitted).

actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States.” 28 U.S.C. § 1332(a)(1). Shasta contends that diversity does not exist because both it and PharmaTech are citizens of California.

“A Rule 12(b)(1) jurisdictional attack may be facial or factual.” *Safe Air For Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial attack, the movant asserts that the lack of subject matter jurisdiction is apparent from the face of the complaint. *Id.* In a factual attack, the movant disputes the truth of allegations that otherwise would give rise to federal jurisdiction. *Id.* “In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment.” *Id.* “The court need not presume the truthfulness of the plaintiff’s allegations.” *Id.* Once the moving party has presented evidence demonstrating the lack of subject matter jurisdiction, the party opposing the motion must present affidavits or other evidence sufficient to establish subject matter jurisdiction. *Id.*

Shasta mounts a factual attack here, because although the FAC suggests that it and PharmaTech are citizens of different states, *see* FAC ¶¶ 3-4, Shasta asserts that in fact both companies are citizens of California. The FAC alleges that Shasta “is an Oregon limited liability company, with its principal place of business at 16923 SW Richen Park Circle, Sherwood, Oregon.” FAC ¶ 4. While this allegation suggests that Shasta is an Oregon citizen, a limited liability company is “a citizen of every state of which its owners/members are citizens.” *Johnson v. Columbia Prop. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006). One of Shasta’s owners/members, Calvin A. Knickerbocker, Jr., is a citizen of California. *See* Calvin A. Knickerbocker, Jr. Decl. ¶¶ 3-4, ECF 30-2. PharmaTech does not dispute Shasta’s California citizenship.

Shasta’s motion thus turns on whether PharmaTech also is a citizen of California. For purposes of diversity jurisdiction, a corporation is deemed to be a citizen of both its state of incorporation and the “state where it has its principal place of business.” 28 U.S.C. § 1332(c). The FAC alleges that PharmaTech “is a Nevada Corporation with its *principal executive offices* located at 925 Borom Road, York, Pennsylvania.” FAC ¶ 3 (emphasis added). Presumably, this

1 allegation is intended to suggest that PharmaTech’s principal place of business is located in
2 Pennsylvania, which would make PharmaTech a citizen of Nevada and Pennsylvania. Shasta
3 contends that PharmaTech’s principal place of business is not in York, Pennsylvania but in
4 Westlake Village, California.

5 A corporation’s principal place of business is “the place where a corporation’s officers
6 direct, control, and coordinate the corporation’s activities.” *Hertz Corp. v. Friend*, 559 U.S. 77,
7 92 (2010). “[I]t should normally be the place where the corporation maintains its headquarters –
8 provided that the headquarters is the actual center of direction, control, and coordination, *i.e.*, the
9 ‘nerve center,’ and not simply an office where the corporation holds its board meetings (for
10 example, attended by directors and officers who have traveled there for the occasion).” *Id.* at 93.

11 Shasta points out that the original complaint alleged that PharmaTech’s “principal place of
12 business” is in Westlake, California, while the FAC alleges that PharmaTech’s “principal
13 executive offices” are in York, Pennsylvania. *Compare* Compl. ¶ 3 with FAC ¶ 3. Shasta argues
14 that PharmaTech should be bound by its original allegation. However, PharmaTech’s attorney has
15 submitted a declaration stating that he drafted the original complaint and that the allegation therein
16 regarding the company’s principal place of business being in Westlake was due to his
17 inadvertence. Troff Decl. ¶ 3, ECF 37. The Court accepts counsel’s representation and has not
18 considered the allegation in the original complaint.

19 Both sides rely upon the declaration and deposition testimony of Keith Berman
20 (“Berman”), who is referred to as PharmaTech’s “principal executive officer,” “CEO,” and
21 “director,” and who was deposed as PharmaTech’s Rule 30(b)(6) witness. The record does not
22 present any significant factual disputes as to the operations of PharmaTech. The parties differ,
23 however, in the legal conclusions to be drawn from the record evidence. PharmaTech’s Board of
24 Directors consists of Berman, who lives in Westlake, California, and two other individuals who
25 live in Northern California and Illinois. Berman Decl. ¶ 14. All Board meetings are conducted by
26 telephone. Thus there is no obvious location from which PharmaTech’s “officers direct, control,
27 and coordinate the corporation’s activities.” *Hertz*, 559 U.S. at 92.

28 PharmaTech has offices in Westlake, California, where Berman lives, and in York,

1 Pennsylvania, where the GenStrip is manufactured. Berman Dep. 14:5-9; Berman Decl. ¶¶ 9-10.
 2 PharmaTech has six or seven employees working at the Westlake office. Berman Decl. ¶ 15.
 3 Those employees “operate PharmaTech’s Call Center, i.e., the place where any customer
 4 complaints or other customer communications take place.” *Id.* Berman himself works out of both
 5 the Westlake office and the York office. Berman Dep. 14:10-12. However, he travels to the York
 6 office only twice a month and, possibly, not even that often. *See* Berman Dep. 14:19 (“twice a
 7 month”); Berman Decl. ¶ 13 (“often every other week”). No other PharmaTech employees ever
 8 work at the York office. Berman Dep. 16:7-9. The York office is located at the same address as
 9 the CTI factory, and it doubles both as Berman’s office and a storage site for recalled GenStrips.
 10 Berman Dep. 17:14-18; Berman Decl. ¶¶ 9-10. CTI is the independent contractor that actually
 11 produces the GenStrip while PharmaTech is the “manufacturer” for FDA compliance purposes.
 12 Duval Decl. ¶¶ 4-6.

13 This evidence does not present any obvious answer with respect to the location of
 14 PharmaTech’s “nerve center.” This Court finds Shasta’s motion to present one of the “hard cases”
 15 that the Supreme Court has recognized exists “in this era of telecommuting, [when] some
 16 corporations may divide their command and coordinating functions among officers who work at
 17 several different locations, perhaps communicating over the Internet.” *Hertz*, 559 U.S. at 95-96.
 18 Berman states in his declaration that he makes all decisions regarding manufacture of the
 19 GenStrip, including FDA compliance, when in York, and “[c]onsequently, PharmaTech’s ‘nerve
 20 center’ *with respect to the GenStrip*, is in York, Pennsylvania.” Berman Decl. ¶ 13 (emphasis
 21 added). However, the Supreme Court has made clear that a company’s nerve center is a single
 22 place. *Hertz*, 559 U.S. at 93. Thus the question presented by Shasta’s motion is not the location
 23 of the PharmaTech’s nerve center with respect to the GenStrip, but rather the nerve center of the
 24 company as a whole.

25 At the hearing, PharmaTech’s counsel pointed to Berman’s declaration statement that
 26 PharmaTech is not involved in the manufacture or distribution of any product other than the
 27 GenStrip, *see* Berman Decl. ¶ 16, and argued that as a result the company’s nerve center with
 28 respect to the GenStrip necessarily is its nerve center for purposes of diversity. However, based

upon this record, Berman appears to be the man on the ground with respect to running PharmaTech, and he spends only a few days a month at the York location. The rest of the month, the York location is “nothing more than a mail drop box, a bare office with a computer,” *Hertz*, 559 U.S. at 97, and more particularly in this case, a store room for returned product. Moreover, while Berman’s deposition testimony and declaration indicate that all decisions regarding *manufacturing* are made in York, they do not speak to where PharmaTech makes decisions regarding marketing, sales, customer relations, strategic planning, financial control and review, or other aspects of PharmaTech’s operations. In fact PharmaTech only accounts for what may be as little as one or two days per month of Berman’s activities.²

PharmaTech argues that its Board affirmatively decided to move its “principal executive offices” to York and that the York address is the one registered with the FDA. *See* Berman Decl. ¶¶ 9-10. The Supreme Court rejected a similar argument in *Hertz*, stating that “we reject suggestions such as, for example, the one made by petitioner that the mere filing of a form like the Securities and Exchange Commission’s Form 10-K listing a corporation’s ‘principal executive offices’ would, without more, be sufficient proof to establish a corporation’s ‘nerve center.’” *Hertz*, 559 U.S. at 97.

“The burden of persuasion for establishing diversity jurisdiction, of course, remains on the party asserting it.” *Hertz*, 559 U.S. at 96. The Court concludes that PharmaTech has failed to meet that burden here. Based upon this record, the York office appears to be the “bare office with a computer” described in *Hertz*; in fact, it is not even clear that the York office *has* a computer. Accordingly, the Court concludes that PharmaTech has failed to present evidence sufficient to establish that the York office, rather than the Westlake office, is PharmaTech’s nerve center. Because the Westlake office is PharmaTech’s nerve center, PharmaTech is a California citizen. As both PharmaTech and Shasta are citizens of California, diversity jurisdiction does not lie.

Shasta’s motion to dismiss based upon lack of subject matter jurisdiction is GRANTED.

² Berman states in his declaration that he travels to York “often every other week” (suggesting that at times he travels less) and he does not indicate whether the trips last longer than a single day. Berman Decl. ¶ 13.

1 In light of the Court's disposition on jurisdiction grounds, the motion to dismiss for failure to state
2 a claim is MOOT.

3 **III. ORDER**

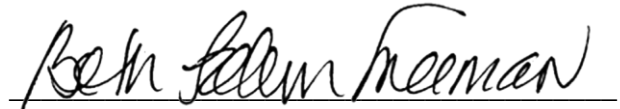
4 (1) The motion to dismiss for lack of subject matter jurisdiction is GRANTED;

5 (2) The motion to dismiss for failure to state a claim is DENIED AS MOOT; and

6 (3) The action is DISMISSED; the Clerk shall close the file.

7 **IT IS SO ORDERED.**

8
9 Dated: April 20, 2015



BETH LABSON FREEMAN
United States District Judge